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## Comment

### **MERCY HOSPITAL, INC. v. JACKSON: A RECURRING DILEMMA FOR HEALTH CARE PROVIDERS IN THE TREATMENT OF JEHOVAH'S WITNESSES**

DAVID H. BAMBERGER\*

One of the most difficult medical legal problems confronting hospitals and other health care providers is the treatment of Jehovah's Witnesses who are in need of a blood transfusion but who refuse that procedure on religious grounds. Approximately 650,000 Jehovah's Witnesses currently reside in the United States,<sup>1</sup> and one of the fundamental tenets of their religion prohibits them from having blood transfusions under any circumstances.<sup>2</sup> In the event that a Jehovah's Witness requires a blood transfusion to save the patient's life, health care providers face a dilemma: they may accede to the patient's refusal of the procedure, knowing that the patient may die, or they may violate the patient's religious beliefs by administering a blood transfusion against the patient's will. The former choice runs contrary to the ethical orientation of the medical profession to preserve life and increases the likelihood of malpractice suits. On the other hand, even if blood is given pursuant to a court order, the procedure may violate the patient's constitutional rights and common-law rights to refuse treatment and to informed consent.

Until recently, the appellate courts of Maryland had not had occasion to offer any guidance to health care providers regarding this recurring dilemma.<sup>3</sup> Unfortunately, when an opportunity to clarify

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1. UNITED STATES DEPT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 49 (1986).

2. See generally WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, BLOOD, MEDICINE AND THE LAW OF GOD (1961). The passages from Scriptures upon which this belief is based include *Leviticus* 17:10 and *Acts* 15:20, 28-29.

3. The only other case reaching the Court of Appeals of Maryland involving the rights of a Jehovah's Witness to refuse a blood transfusion was *Hamilton v. McAuliffe*, 277 Md. 336, 353 A.2d 634 (1976). In that case, the Court of Appeals dismissed as moot a declaratory judgment action brought nearly a year after the trial court had authorized a transfusion for the patient. At least two Maryland trial court decisions have reached the

the respective rights and obligations of health care providers and their Jehovah's Witness patients arose in *Mercy Hospital, Inc. v. Jackson*,<sup>4</sup> the Court of Appeals of Maryland ruled that the controversy was moot and refused to reach the merits of the case.

### I. THE JACKSON CASE

Ernestine Jackson was twenty-six weeks pregnant when she was admitted to Mercy Hospital on February 26, 1984, as a result of premature labor. Due to the position of the fetus and the placenta, as well as Mrs. Jackson's prior medical history, her physicians believed that a vaginal delivery was contraindicated and that, regardless of the method of delivery, there was a fifty percent likelihood that a blood transfusion would be required.<sup>5</sup> In her physicians' opinion, Mrs. Jackson's failure to receive a needed blood transfusion would not endanger the infant but likely would result in Mrs. Jackson's death.<sup>6</sup> Mrs. Jackson stated that, on the basis of her religious beliefs, she would rather accept the risk of death than receive a blood transfusion. Her physician had no reservation about her mental capacity and believed that she was alert, oriented, and capable of making such a decision. Mrs. Jackson's husband, also a Jehovah's Witness, stated that he would support her decision and that, in the event of her death, he would try his best to raise their child.<sup>7</sup>

Mercy Hospital petitioned the Circuit Court for Baltimore City to have a temporary guardian appointed for Mrs. Jackson for the purpose of giving consent to a blood transfusion for her, should one

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merits in cases involving blood transfusions for Jehovah's Witness patients. See *Bon Secours Hospital v. Jackson*, No. 44A/17/A53829 (Cir. Ct. for Baltimore City 1974) (refusing to order transfusion for 21-year-old male Jehovah's Witness); *In re Fuentes*, Equity No. 85366 (Cir. Ct. for Montgomery County 1983) (then-Circuit Court Judge John F. McAuliffe) (authorizing transfusions for a 28-year-old Jehovah's Witness after the birth of her fifth child).

4. 306 Md. 556, 510 A.2d 562 (1986).

5. In connection with an earlier pregnancy, Mrs. Jackson had undergone surgery for a myoma of the uterus, a tumor consisting of muscle tissue. Because of the previous surgery, Mrs. Jackson faced a risk of a ruptured uterus if a vaginal delivery were attempted. On the other hand, a Caesarian delivery also posed a significant risk for Mrs. Jackson if she would need a blood transfusion, because the placenta was positioned near the area where a Caesarian incision would have to be made.

6. *Mercy Hospital, Inc. v. Jackson*, 62 Md. App. 409, 412 n.2, 489 A.2d 1130, 1131 n.2 (1985), *vacated as moot*, 306 Md. 556, 510 A.2d 562 (1986).

7. Mrs. Jackson's physicians and others testified concerning her condition at a hearing in her hospital room on February 26, 1984. The transcript of that hearing is contained in the record of *In re Ernestine Jackson*, No. 84060043/E17362 (Cir. Ct. for Baltimore City 1984).

prove necessary.<sup>8</sup> An emergency hearing was held at Mrs. Jackson's bedside, at which time testimony was heard from Mrs. Jackson, her husband, her physicians, and others. Following the hearing, Judge Martin B. Greenfeld ruled that Mrs. Jackson was a competent, pregnant adult who had a right to refuse a blood transfusion in accordance with her religious beliefs, when that decision was made knowingly and voluntarily and would not endanger the delivery, survival, or support of the fetus.<sup>9</sup> In so ruling, Judge Greenfeld noted that the Court of Appeals had not yet had occasion to decide the issue and that there was no unanimity of opinion in similar cases from other jurisdictions. Mrs. Jackson underwent a Caesarian section and delivered her infant without requiring a blood transfusion, and both survived and were released from the hospital.

Mercy Hospital appealed the trial court's decision to the Court of Special Appeals. Although court-appointed counsel for Mrs. Jackson filed a motion asking the court to dismiss the appeal as moot on the grounds that Mrs. Jackson no longer required the medical treatment at issue and that it was extremely unlikely that Mrs. Jackson would seek such treatment again, the hospital and amicus, the State of Maryland, argued that the issues presented were likely to recur and should be decided. The Court of Special Appeals agreed that it should reach the merits and affirmed Judge Greenfeld's decision.<sup>10</sup> Subsequently, Mercy Hospital filed a petition for a writ of certiorari, which was granted by the Court of Appeals of Maryland.<sup>11</sup>

In the Court of Appeals, in addition to the briefs of the parties, briefs were filed by amici University of Maryland Medical System Corporation and the State of Maryland. Mercy Hospital and both amici urged the Court of Appeals to reach the merits of the case.

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8. Because of the emergency circumstances, Mercy Hospital orally petitioned the Circuit Court for Baltimore City for appointment of a temporary guardian for Mrs. Jackson. That petition was denied. Thereafter, Mercy Hospital filed a written petition *nunc pro tunc*. The legal basis upon which the hospital petitioned the court was MD. EST. & TRUSTS CODE ANN. § 13-709(c) (1974), as well as the court's general equity jurisdiction. Section 13-709 allows a court to order emergency protective services for an adult lacking capacity to consent when no other person authorized to give consent is available. Section 13-709 was inapposite, however, because the trial court found that Mrs. Jackson was fully competent.

9. On March 1, 1984, Judge Greenfeld entered a Memorandum and Order as of February 26, 1984, *nunc pro tunc*. That Memorandum and Order was filed on March 5, 1984, and is contained in the record of *In re Ernestine Jackson*, No. 84060043/E17362 (Cir. Ct. for Baltimore City 1984).

10. *Mercy Hospital, Inc. v. Jackson*, 62 Md. App. 409, 489 A.2d 1130 (1985), *vacated as moot*, 306 Md. 556, 510 A.2d 562 (1986).

11. 304 Md. 47, 497 A.2d 484 (1985).

Moreover, in contrast to the position taken by Mrs. Jackson in the Court of Special Appeals, counsel for Mrs. Jackson agreed with Mercy Hospital and both amici that the Court of Appeals should decide the case even though the specific controversy was moot.<sup>12</sup>

The Court of Appeals refused to find that the Jackson controversy was one of those "rare instances" when the court ought to reach the merits of a moot case.<sup>13</sup> The court referred to its earlier decision in *Hamilton v. McAuliffe*<sup>14</sup> for the proposition that blood transfusion controversies are so dependent upon the particular factual circumstances of each case that any ruling on the merits in the Jackson case would afford little guidance to trial judges or parties in future cases.<sup>15</sup> The Court of Appeals also relied upon its established policy of deciding constitutional issues only when necessary.<sup>16</sup>

In a strongly worded dissent, Judge McAuliffe stated that the Jackson case, while clearly moot, presented a "textbook example" of when an appellate court should express its view on important questions of substantial public concern which, although presented in a moot case, are "capable of repetition, yet evading review."<sup>17</sup> Judge McAuliffe noted that cases like the one at bar arise under emergency conditions that do not permit adequate briefing, oral argument, and "unhurried contemplation" of the issues.<sup>18</sup> Judge McAuliffe further observed that, although the precise facts of this case may not recur, the fundamental issues will; therefore, trial judges, attorneys, health care providers, and other interested persons are in immediate need of guidance on those issues.<sup>19</sup>

The remainder of this comment will be devoted to an examination of the issues raised by the *Jackson* case, a review of rules of decision employed by courts in other jurisdictions, and a brief commentary regarding the application of that jurisprudence to the

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12. 306 Md. at 560-61, 510 A.2d at 564.

13. *Id.* at 562-63, 510 A.2d at 565.

14. 277 Md. 336, 353 A.2d 634 (1976).

15. 306 Md. at 563, 510 A.2d at 565.

16. *Id.* at 565, 510 A.2d at 566.

17. *Id.* (McAuliffe, J., dissenting); *accord* John F. Kennedy Memorial Hosp. v. Heston, 58 N.J. 576, 579, 279 A.2d 670, 671 (1971) ("The controversy is moot . . . . Nonetheless, the public interest warrants a resolution . . . ."); *In re Estate of Dorone*, 349 Pa. Super. 59, 66, 502 A.2d 1271, 1275 (1985) ("there is a large class of other Jehovah's Witnesses, and it is reasonably likely that at least some of these will be involved in emergencies in which a doctor will seek a court order authorizing a transfusion") (emphasis in original), *appeal granted*, 515 A.2d 893 (Pa. 1986).

18. 306 Md. at 567, 510 A.2d at 567 (McAuliffe, J., dissenting).

19. *Id.*

*Jackson* case and the refusal by the Court of Appeals of Maryland to offer guidance relating to these matters.

## II. THE PATIENT'S COMMON-LAW RIGHTS TO REFUSE TREATMENT, TO INFORMED CONSENT, AND TO EMERGENCY TREATMENT

In the *Jackson* case the trial judge held that Mrs. Jackson was a competent, pregnant adult who had a "paramount right" to refuse a blood transfusion on the basis of her religious beliefs, as long as that decision was knowing and voluntary and would not endanger the fetus. It is not entirely clear whether this "paramount right" that Judge Greenfeld discerned is one founded in the federal Constitution or in the common law or both. In any event, such rights have been founded upon both sources by courts in other jurisdictions.

It appears doubtful, absent court involvement, that state action ordinarily is implicated in the relationship between a patient and a health care provider.<sup>20</sup> It is well settled that the first and fourteenth amendments to the United States Constitution prohibit only governmental infringement of the free exercise of religion, and that no first or fourteenth amendment issue is raised with regard to a dispute between private parties.<sup>21</sup> A similar requirement of state action also applies with regard to other rights protected by the fourteenth amendment, such as the right to privacy.<sup>22</sup> Nevertheless, even in the absence of state involvement, patients have certain common-law rights that are deemed to arise out of the traditional physician-patient relationship.

The common law recognizes that a patient has a right to refuse treatment and to determine what shall be done with one's own body.<sup>23</sup> For example, in *Erickson v. Dilgard*,<sup>24</sup> a competent, adult Je-

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20. See, e.g., *Blum v. Yaretsky*, 457 U.S. 991, 1004-10 (1982) (holding that there was no state action in decisions by nursing homes to transfer or discharge patients, even though nursing homes are subject to state regulation); *Shorter v. Drury*, 103 Wash. 2d 645, 695 P.2d 116, cert. denied, 106 S. Ct. 86 (1985) (holding that a wrongful death malpractice action by spouse of Jehovah's Witness was a dispute between private parties). But see *Holmes v. Silver Cross Hosp.*, 340 F. Supp. 125 (N.D. Ill. 1972) (holding that pervasive regulation of hospitals provides "state action").

21. *Massachusetts Universalist Convention v. Hildreth & Rogers*, 183 F.2d 497, 501 (1st Cir. 1950); *United States Nat'l Bank of Portland v. Snodgrass*, 202 Or. 530, 543, 275 P.2d 860, 866 (1954).

22. *In re Welfare of Coyer*, 99 Wash. 2d 114, 660 P.2d 738 (1983).

23. As stated by Judge Cardozo in *Schloendorff v. New York Hospital*, 211 N.Y. 125, 129-30, 105 N.E. 92, 93 (1914), overruled on other grounds, *Bing v. Thunig*, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957): "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who

hovah's Witness refused a blood transfusion considered medically necessary in connection with an operation. The court refused to order the transfusion, holding that it is the patient who must have the "final say" in a medical decision concerning him or her.<sup>25</sup> This principle also has been generally recognized by those who regulate the medical profession.<sup>26</sup>

Another common-law right, corollary to the adult patient's right to refuse treatment, is the patient's right to informed consent regarding proposed treatment. In Maryland the seminal case on informed consent is *Sard v. Hardy*.<sup>27</sup> In that case the Court of Appeals ruled that a physician cannot properly undertake to perform surgery or administer therapy without the prior consent of the adult patient after a fair and reasonable explanation of the proposed treatment.<sup>28</sup> The Court of Appeals explained that this rule is founded upon an

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performs an operation without his patient's consent commits an assault, for which he is liable in damages."

24. 44 Misc. 2d 27, 252 N.Y.S.2d 705 (1967).

25. *Id.* at 28, 252 N.Y.S.2d at 706; *see also In re Quackenbush*, 156 N.J. Super. 282, 383 A.2d 785 (1978) (refusing on constitutional grounds to order amputation of gangrenous feet of 72-year-old patient).

26. *See* Point No. 4 of *Patient's Bill of Rights* (adopted by The American Hospital Association in 1975), made applicable to hospitals in Maryland by MD. HEALTH-GEN. CODE ANN. § 19-308(a)(1) and COMAR § 10.07.01.09 ("The patient has the right to refuse treatment to the extent permitted by law and to be informed of the medical consequences of his action."). *But see* 1985 ACCREDITATION MANUAL OF JOINT COMMITTEE ON ACCREDITATION OF HOSPITALS [hereinafter JCAH MANUAL] (when patient's refusal of treatment prevents the provision of appropriate care in accordance with professional standards, the physician may terminate the relationship with the patient upon reasonable notice).

27. 281 Md. 432, 379 A.2d 1014 (1977).

28. *Id.* at 439, 379 A.2d at 1019. In Maryland, under certain circumstances, substituted consent may be given on behalf of a patient unable to make or communicate a responsible decision. *See* MD. HEALTH-GEN. CODE ANN. § 20-107(c)(3) (1982). That section provides for substituted consent on behalf of "disabled individuals" and for treatment of "disabled individuals" without consent in cases of medical emergencies. Subsection (b) of that section provides, however, that treatment is not authorized if the health care provider knows that the treatment is contrary to the religious belief of the disabled person. Section 20-107(f)(2) provides that substituted consent may not be used if the health care provider is aware that the patient has expressed disagreement with the decision to provide treatment. Section 20-102 of the Health-General Article identifies the circumstances in which a minor is deemed to have the same capacity as an adult to consent to medical treatment. *See also* *Wentzel v. Montgomery General Hosp., Inc.*, 293 Md. 685, 447 A.2d 1244 (1982) (holding that equity court has common-law *parens patriae* power over incompetent minors and may authorize a guardian to consent to medical procedure), *cert. denied*, 459 U.S. 1147 (1983); *cf. In re Boyd*, 403 A.2d 744 (D.C. 1979) (holding that adult mental patient who had rejected use of psychotropic drugs on religious grounds prior to incompetency had right to refuse medical treatment, and court should use substituted judgment approach to determine what choice individual would make if currently competent).

adult patient's right to exercise control over one's own body "at least when undergoing elective surgery."<sup>29</sup> Thus, the physician in *Sard* was found to have a duty to explain the procedure to the patient and to warn the patient of any material risks or dangers inherent in or collateral to the therapy, in order to enable the patient to make an intelligent and informed choice about whether or not to undergo the treatment.<sup>30</sup> A material risk was defined by the court in *Sard* as "one which a physician knows or ought to know would be significant to a reasonable person in the patient's position in deciding whether or not to submit to a particular medical treatment or procedure."<sup>31</sup> The Court of Appeals was careful to caution, however, that the duty of disclosure is suspended when an emergency exists and it is impractical to obtain the patient's consent.<sup>32</sup>

In addition to the rights to refuse treatment and to informed consent, courts in certain jurisdictions also have found that patients may have a common-law right to receive treatment in emergency situations. Traditionally, the common-law rule has been that private hospitals have no duty to maintain emergency rooms and that no person has the right to demand admission to a hospital.<sup>33</sup> However, in recent years, courts in various jurisdictions have demonstrated an increasing reluctance to permit hospitals to turn away patients, at least in the context of medical emergencies.<sup>34</sup> Thus, a patient in

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29. 281 Md. at 439, 379 A.2d at 1019.

30. *Id.*

31. *Id.* at 444, 379 A.2d at 1022.

32. *Id.* at 445, 379 A.2d at 1022.

33. *E.g.*, *Birmingham Baptist Hosp. v. Crews*, 229 Ala. 398, 157 So. 224 (1934); *McDonald v. Massachusetts General Hosp.*, 120 Mass. 432 (1876), *overruled on other grounds*, *Colby v. Carney Hospital*, 356 Mass. 527, 254 N.E.2d 407 (1969); *VanCampen v. Olean General Hosp.*, 210 A.D. 204, 205 N.Y.S. 554 (1924), *aff'd*, 239 N.Y. 615, 147 N.E. 219 (1925).

The law historically has refused to impose upon a stranger the obligation to go to the aid of another human being, even if the other is in mortal danger. PROSSER & KEETON ON THE LAW OF TORTS § 56, at 375 (5th ed. 1984). However, if a "good samaritan" attempts to help another, he or she may assume a liability that did not attach originally. *Id.* at 378.

In Maryland, under certain circumstances, a "good samaritan" physician may be protected from civil liability for acts or omissions in rendering assistance or medical care. MD. CTS. & JUD. PROC. CODE ANN. § 5-309 (1984 & Supp. 1986). However, § 5-309 protects a physician only for care provided "at the scene of an emergency," "in transit to a medical facility," or "through communications with personnel providing emergency assistance." Although apparently no cases have construed this portion of § 5-309, it appears that the statute would not apply to physicians who provide emergency care in a hospital. Furthermore, § 5-309 applies only when the assistance or medical care is provided without fee or compensation. Because hospitals ordinarily charge a fee for emergency room care, the statute would seem inapplicable in such cases.

34. *See Guerrero v. Copper Queen Hosp.*, 112 Ariz. 104, 537 P.2d 1329 (1975) (pri-



Mrs. Jackson's circumstances has a right under common law to refuse treatment, a right to informed consent and, at least in some jurisdictions, a right to emergency treatment.

### III. THE PATIENT'S CONSTITUTIONAL RIGHTS TO THE FREE EXERCISE OF RELIGION AND TO PRIVACY MUST BE BALANCED AGAINST THE INTERESTS OF THE STATE

Other rights that arise under the Constitution become implicated once there is the requisite state action, either through invocation of the state judicial system or through some other nexus with the state.<sup>35</sup> Those constitutional rights include the right to the free exercise of religion under the first and fourteenth amendments<sup>36</sup> and the right to privacy.<sup>37</sup>

In the instant case the trial court apparently based its refusal to order Mrs. Jackson to undergo a blood transfusion in part on her

vate hospital had duty to treat every patient when public policy had been declared by statute or otherwise); *Stanturf v. Sipes*, 447 S.W.2d 558 (Mo. 1969) (reversing summary judgment for defendant and finding plaintiff could have relied on known policy of hospital to treat); cf. JCAH MANUAL, *supra* note 26, at 17 ("any individual who comes to the hospital for emergency medical evaluation or initial treatment shall be properly assessed by qualified individuals, and appropriate services shall be rendered within the defined capability of the hospital"). See generally Annotation, *Liability of Hospital for Refusal to Admit or Treat Patient*, 35 A.L.R.3d 841 (1971 & Supp. 1986).

In *Wilmington General Hosp. v. Manlove*, 54 Del. 15, 174 A.2d 135 (1961), the Supreme Court of Delaware cited dictum in *Levin v. Sinai Hosp.*, 186 Md. 174, 46 A.2d 298 (1946), for the proposition that a private hospital is under no common-law duty to serve everyone who seeks treatment. However, the court in *Manlove* ruled that a hospital may be liable for refusing to treat a patient when an unmistakable emergency exists if the patient has or could have relied upon a well-established custom of the hospital to render aid in such a case. 54 Del. at 25, 174 A.2d at 140.

35. See *supra* notes 20-22 and accompanying text.

36. The first amendment to the United States Constitution provides in pertinent part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

The fourteenth amendment to the Constitution makes this first amendment protection applicable to action by the state as well. See *Cantwell v. Connecticut*, 310 U. S. 296, 303 (1940).

37. Certain courts have concluded that, in addition to a first amendment right to the free exercise of religion, patients have a right to privacy under the fourteenth amendment, permitting them to be free from nonconsensual invasion of their bodily integrity. See, e.g., *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *In re Brown*, 478 So. 2d 1033 (Miss. 1985); cf. *Roe v. Wade*, 410 U.S. 113 (1973) (right of privacy in abortion decision); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (right of marital privacy regarding use of contraceptives); *Union Pacific Ry. v. Botsford*, 141 U.S. 250, 251 (1891) (discussing common-law right to be free from non-consensual invasions); Warren & Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (same).

constitutional right to free exercise of her religion. Courts generally have recognized, however, that this right is not absolute.<sup>38</sup> In determining whether to order an adult patient to submit to a blood transfusion over the patient's objection on religious grounds, courts must balance the interests of the state against the patient's constitutional rights. Only those state interests that are "compelling" are deemed to outweigh legitimate claims to the free exercise of religion.<sup>39</sup>

Even though courts have arrived at varying and occasionally inconsistent results based upon the facts of different cases, there is general agreement in all jurisdictions as to those state interests that must be considered in determining whether to order a patient to undergo a blood transfusion against the patient's religious beliefs. Those state interests include: (1) the protection of innocent third parties, (2) maintaining the integrity of medical practice, (3) the preservation of life, and (4) the prevention of suicide.<sup>40</sup>

#### *A. Protecting Innocent Third Parties*

Courts have balanced the interests of the state against the patient's rights with varying results that appear to depend upon the unique facts and circumstances of each case. However, the factor that most frequently appears to determine the outcome of this balancing test is the presence of minor children or other innocent third parties whom the state has a duty to protect.<sup>41</sup> For example, one of

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38. Whereas freedom of religious belief may be absolute, religious conduct has been held subject to regulation for the protection of society. *Cantwell v. Connecticut*, 310 U.S. at 303-04; *see Reynolds v. United States*, 98 U.S. 145 (1878) (holding that court may preserve community morality by prohibiting religious practice of bigamy); *Lawson v. Commonwealth*, 291 Ky. 437, 164 S.W.2d 972 (1942) (holding that court may protect the public from poisonous snakes used in religious ritual); *cf. Jacobson v. Massachusetts*, 197 U.S. 11 (1905) (holding that state law requiring individuals to submit to vaccination did not violate right to liberty under fourteenth amendment).

39. *McMillan v. State*, 258 Md. 147, 152, 265 A.2d 453, 456 (1970); *see Wisconsin v. Yoder*, 406 U.S. 205, 234 (1972) (holding that Wisconsin law requiring attendance in school until age sixteen infringed upon religious freedom of Amish parents who refused on religious grounds to send children to public school beyond the eighth grade); *Sherbert v. Verner*, 374 U.S. 398 (1963) (holding that Seventh Day Adventist discharged for refusal to work on Saturday was improperly denied unemployment compensation).

40. *See, e.g., Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977); *see generally* Annotation, *Power of Court or Other Public Agency to Order Medical Treatment Over Religious Objections for Child Whose Life Is not Immediately Endangered*, 52 A.L.R.3d 1118 (1973 & Supp. 1986) and 97 A.L.R.3d 421 (1980 & Supp. 1986).

41. In cases in which the patient is a minor, the courts uniformly have held that, despite parents' religious convictions to the contrary, medical treatment may be ordered

the leading cases in which a court found the state's interests sufficiently compelling to merit a court-ordered transfusion, despite the patient's opposition on religious grounds, is *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*.<sup>42</sup> In that case a pregnant Jehovah's Witness refused a blood transfusion, despite advice that both mother and child would die if the procedure were not done.<sup>43</sup> The trial court had refused to order the transfusion on the ground that it is improper for the judiciary to intervene in the case of an adult or with respect to an unborn child.<sup>44</sup> The Supreme Court of New Jersey reversed the lower court's decision, holding that the unborn child was entitled to the law's protection.<sup>45</sup> The court expressly reserved decision on the issue of whether an adult may be ordered to submit to a blood transfusion if the life of a child is not at stake.<sup>46</sup>

Similarly, in other cases in which the patient already is the parent of a minor child, courts have ordered medically necessary blood transfusions for the parent, despite the patient's religious objection and even though the lack of a transfusion did not directly threaten the child's life or health. The courts' concern has been not only for the physical health of the child, but also for the quality of the child's life and the upbringing that the child would have if the parent were to die.<sup>47</sup>

In contrast, in cases in which the patient has no minor children, courts more readily have honored the patient's objection to a blood

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to save the life of the patient. See, e.g., *Levitsky v. Levitsky*, 231 Md. 388, 398, 190 A.2d 621, 625-26 (1963) (holding that court may protect a child by an appropriate order when parental views pose a serious danger to the life or health of the child); *Craig v. State*, 220 Md. 590, 596, 155 A.2d 684, 687-88 (1959) (holding that parents have an implied duty under Maryland statute to provide minor children with medical care pursuant to MD. ANN. CODE art. 72A, § 1 (1957), now codified at MD. FAM. LAW CODE ANN. § 5-203 (1984)).

42. 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964).

43. *Id.* at 422, 201 A.2d at 537-38.

44. *Id.* at 423, 201 A.2d at 538.

45. *Id.*; accord *Application of Jamaica Hosp.*, 128 Misc. 2d 1006, 491 N.Y.S.2d 898 (1985).

46. 42 N.J. at 423, 201 A.2d at 538; see also *infra* notes 62-68 and accompanying text.

47. See, e.g., *Application of the President and Directors of Georgetown College*, 331 F.2d 1000 (D.C. Cir.), cert. denied, 377 U.S. 978 (1964) (when a patient was *in extremis* and neither patient nor husband would permit a transfusion, ordering transfusion on the basis of the state's interest in preserving the life of the mother and not permitting her to "abandon" her seven-month-old child); *In re Winthrop University Hosp.*, 128 Misc. 2d 804, 490 N.Y.S.2d 996 (1985) (holding that patient had responsibility to the community to care for her infant); *Powell v. Columbian Presbyterian Medical Center*, 49 Misc. 2d 215, 267 N.Y.S.2d 450 (1965) (ordering transfusion for Jehovah's Witness who was mother of six by rationalizing that the patient "did not object" to receiving a transfusion although she "would not . . . direct its use").

transfusion on religious grounds. For example, in *In re Brooks' Estate*<sup>48</sup> a competent, adult Jehovah's Witness with no minor children refused a blood transfusion on religious grounds and signed a document releasing the health care providers from liability.<sup>49</sup> Nevertheless, the lower court appointed a conservator, and the transfusion was given over the patient's objection.<sup>50</sup> On appeal the Supreme Court of Illinois held that the lower court had erred in ordering the transfusion.<sup>51</sup> In so ruling the court distinguished another often cited case, *Application of President and Directors of Georgetown College*,<sup>52</sup> in which the patient was the mother of minor children who could have become wards of the state if the patient had died.<sup>53</sup>

In another case involving a childless patient, *In re Melideo*,<sup>54</sup> the court upheld the right of the patient to refuse a blood transfusion on religious grounds, finding that there was no overriding, compelling state interest.<sup>55</sup> As in the *Brooks* case, the court indicated that its decision might have been different if the patient were pregnant or the mother of young children.<sup>56</sup>

There are occasional exceptions to this general pattern of rulings upholding the rights of childless patients to refuse blood transfusions and ordering transfusions for those patients with minor children. One such exception is *In re Osborne*,<sup>57</sup> in which the court upheld the right of a thirty-four year old Jehovah's Witness to refuse a blood transfusion, even though she was the mother of two young children. The court relied upon evidence and testimony in the record that the patient had a close extended family and that, should the patient die, the children would be well cared for, and the family business would supply the material needs of the children.<sup>58</sup>

A similar result was reached in a recent opinion involving a competent, twenty-seven year old Jehovah's Witness who refused a

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48. 32 Ill. 2d 361, 205 N.E.2d 435 (1965).

49. *Id.* at 362-63, 205 N.E.2d at 436-37.

50. *Id.* at 363-64, 205 N.E.2d at 437.

51. *Id.* at 374, 205 N.E.2d at 443.

52. 331 F.2d 1000 (D.C. Cir.), *cert. denied*, 377 U.S. 978 (1964).

53. 32 Ill. 2d at 369, 205 N.E.2d at 439. The court in *Brooks* applied a "clear and present danger" standard in balancing the interests involved. Most courts have applied a "compelling state interest" test rather than a "clear and present danger" test in balancing the rights of the patient against those of the state. *Id.* at 372, 205 N.E.2d at 441; see Case Note, 44 TEX. L. REV. 190, 191-92 (1965).

54. 88 Misc. 2d 974, 390 N.Y.S.2d 523 (1976).

55. *Id.* at 975, 390 N.Y.S.2d at 524.

56. *Id.*

57. 294 A.2d 372 (D.C. 1972).

58. *Id.* at 374.

blood transfusion on religious grounds, knowing that he would die without it. In that case, *St. Mary's Hospital v. Ramsey*,<sup>59</sup> the court expressed its concern that the patient had a daughter for whom he was obligated to pay fifty dollars per week in child support.<sup>60</sup> However, the court concluded that the state's interests did not outweigh the patient's right to refuse a transfusion, since the daughter resided with the mother in another state, and there were other means of support available for the child.<sup>61</sup>

### B. *Preserving the Integrity of Medical Practice*

Although the protection of minors is most often the determinative factor for a court in deciding whether to order a patient to undergo a blood transfusion against religious beliefs, many courts also have voiced substantial concern about the impact on the integrity of medical practice of requiring physicians to respect a patient's refusal of a blood transfusion. For example, in *John F. Kennedy Memorial Hospital v. Heston*<sup>62</sup> the Supreme Court of New Jersey had occasion to address the question that it had reserved in the *Raleigh-Fitkin* case.<sup>63</sup> In *Heston* a twenty-two year old unmarried and childless Jehovah's Witness was injured in an automobile accident and required a blood transfusion. The patient was incapacitated, and her mother refused to consent to the procedure.<sup>64</sup> The hospital applied to the court, which appointed a guardian, and as a result of court-ordered surgery and blood transfusion, the patient survived.<sup>65</sup> On appeal the appellate court upheld the lower court's decision, largely on the basis of the state's interest in preserving the integrity of medical practice.<sup>66</sup> The court noted that hospitals, physicians, and other health care providers are dedicated to preserving life and that they should not be asked to operate under the strain of knowing that a blood

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59. 465 So. 2d 666 (Fla. Dist Ct. App. 1985).

60. *Id.* at 668.

61. *Id.* The *Ramsey* court concluded that the state and hospital had not demonstrated sufficiently compelling interests to outweigh Mr. Ramsey's deeply held religious convictions. However, the court was sufficiently concerned with the dilemma to certify the question presented to the Supreme Court of Florida. The latter court, in *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980), had called for examination of these "inscrutable problems" on a case-by-case basis. 379 So. 2d at 361. As of this date, there apparently has been no reported decision by the Supreme Court of Florida on the certified question in the *Ramsey* case.

62. 58 N.J. 576, 279 A.2d 670 (1971).

63. See *supra* notes 42-46 and accompanying text.

64. 58 N.J. at 578, 279 A.2d at 671.

65. *Id.*

66. *Id.* at 582-83, 279 A.2d at 673.

transfusion may not be administered even though it may be medically necessary to save the patient's life.<sup>67</sup> The court further reasoned that, although a prior application to a court is appropriate if time permits, in an emergency a hospital and its staff must be permitted to pursue their functions in accordance with their professional standards.<sup>68</sup>

A similar concern for the integrity of medical practice was expressed in *United States v. George*.<sup>69</sup> In that case the court ordered a blood transfusion for a coherent and rational Jehovah's Witness who was the father of four children. The court held that the physician's conscience and professional oath must be respected and that a patient may decline treatment but "may not demand mistreatment."<sup>70</sup>

Underlying the rationale of protecting the integrity of medical practice is a judicial concern that hospitals and physicians may be held accountable for adverse results that would have been avoidable if the health care providers were not compelled to honor the patient's religious objections. For example, in *Crouse-Irving Memorial Hospital v. Paddock*<sup>71</sup> a hospital and attending physicians were permitted to continue to administer blood transfusions in order to stabilize a pregnant woman's condition, even though the patient objected to the procedure on religious grounds. The court pointed out that the patient wanted the hospital and her doctors to take aggressive medical steps to ensure a proper delivery, including a surgical procedure that could result in her loss of a life-threatening amount of blood. Nevertheless, the patient did not want the medical personnel to correct a possibly grave condition that might be encountered unavoidably in the process.<sup>72</sup> The court distinguished a patient's simply declining a medical procedure from a patient's asking that the procedure be done but only in a certain manner or subject to certain limitations.<sup>73</sup>

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67. *Id.* at 582, 279 A.2d at 673.

68. *Id.* at 583, 279 A.2d at 673.

69. 239 F. Supp. 752 (D. Conn. 1965).

70. *Id.* at 754; *cf. In re Brown*, 478 So. 2d 1033, 1041 (Miss. 1985) (holding that patient may specify conditions of treatment, but health care providers may decline to treat if they conclude that conditions are unacceptable).

71. 127 Misc. 2d 101, 485 N.Y.S.2d 443 (1985).

72. *Id.* at 103, 485 N.Y.S.2d at 445.

73. *Id.*; *see also Davis v. United States*, 629 F. Supp. 1 (E.D. Ark.), *aff'd without opinion*, 802 F.2d 463 (8th Cir. 1986) (dismissing malpractice action by Jehovah's Witnesses when patient's religious convictions "made it impossible to handle the case in accordance with the then-accepted medical standards"); *George*, 239 F. Supp. at 754.

Another case, *Shorter v. Drury*,<sup>74</sup> further illustrates that permitting a patient to dictate the specific procedures that a physician may employ in the course of requested treatment may subject the physician and hospital to inevitable claims of malpractice. *Shorter* was a wrongful death medical malpractice action brought by a husband whose wife died as a result of hemorrhage. The wife had undergone a dilatation and curettage procedure in which her uterus was severely perforated, allegedly due to the doctor's negligence.<sup>75</sup> Prior to the surgery, Mr. and Mrs. Shorter had executed a document releasing the hospital, its personnel, and the attending physician from any responsibility for an adverse result arising out of their refusal to consent to a blood transfusion should one prove necessary.<sup>76</sup> During the course of the procedure, the patient and her husband continued their refusal to authorize a blood transfusion despite repeated warnings by the doctors that she likely would die from severe blood loss. Expert witnesses on both sides agreed that, in all probability, a transfusion would have saved Mrs. Shorter's life.<sup>77</sup>

The jury returned a verdict for the plaintiff, but reduced the wrongful death damages by seventy-five percent on the ground that the Shorters had assumed the risk that Mrs. Shorter would die from loss of blood. On appeal the Supreme Court of Washington (en banc) ruled that the release document was valid, since it was signed knowingly and voluntarily.<sup>78</sup> The court affirmed the judgment on the jury verdict, holding that although the Shorters did not assume the risk of the surgeon's negligence, they did assume the risk of death as a consequence of their refusal to permit a blood transfusion.<sup>79</sup>

Despite some disagreement among courts as to whether the state's interest in preserving the integrity of medical practice is sufficiently compelling to override a patient's religious objection, even those courts that have not so found agree that medical personnel should not be held either criminally responsible or civilly liable for acceding to the refusal of a competent adult to undergo necessary

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74. 103 Wash. 2d 645, 695 P.2d 116, *cert. denied*, 106 S. Ct. 86 (1985).

75. *Id.* at 649, 695 P.2d at 119.

76. *Id.* at 648-49, 695 P.2d at 119.

77. *Id.* at 649, 695 P.2d at 119.

78. *Id.* at 651-52, 695 P.2d at 120.

79. *Id.* at 658, 695 P.2d at 124; *cf.* *Randolph v. City of New York*, 117 A.D.2d 44, 501 N.Y.S.2d 837 (1986) (reversing judgment on jury verdict for the plaintiff patient in wrongful death medical malpractice action in which physician obeyed patient's directive not to give her transfusion, despite complications during Caesarian section, until it was too late to save the patient's life).

medical treatment.<sup>80</sup>

C. *Preserving Life and Preventing Suicide*

The state's interest in preserving life has been cited by a few courts in connection with a patient's refusal on religious grounds to undergo a blood transfusion.<sup>81</sup> Typically, however, courts defer to the patient's religious objection unless the state's interest in protecting minor children or in preserving the integrity of the medical profession is implicated as well.<sup>82</sup>

Although the state's interest in preventing suicide also has been mentioned by courts in connection with Jehovah's Witnesses who have refused blood transfusions, in most instances that consideration is inapposite.<sup>83</sup> For example, in the *Jackson* case it was clear that Mrs. Jackson did not want to die, and she willingly accepted treatment other than a blood transfusion. The state's interest in the prevention of suicide probably is more appropriately considered in the context of cases involving terminally ill patients, and, even then, courts have held that "suicide" encompasses only purposeful self-destruction and not the mere refusal of life-sustaining medical treatment.<sup>84</sup>

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80. See, e.g., *St. Mary's Hosp. v. Ramsey*, 465 So. 2d 666, 669 (Fla. Dist. Ct. App. 1985); JCAH MANUAL, *supra* note 26, at xii ("the patient is responsible for his actions if he refuses treatment or does not follow the practitioner's instructions"). See generally BYRN, *Compulsory Life Saving Treatment for the Competent Adult*, 44 FORDHAM L. REV. 1, 31-32 (1975) (stating that a physician should not be required to undertake a course of treatment contrary to good medical judgment; conversely, a patient's rejection of reasonable treatment relieves the physician of liability for damages resulting from failure to treat).

81. See, e.g., *Satz v. Perlmutter*, 362 So. 2d 160 (Fla. Dist. Ct. App. 1978), *aff'd*, 379 So. 2d 359 (Fla. 1980); *Superintendent of Belchertown State School v. Saikewicz*, 373 Mass. 728, 370 N.E.2d 417 (1977).

82. See, e.g., *Ramsey*, 465 So. 2d at 669 (holding that the state's interest in preserving life is compelling but not an "unswerving mandate"); *John F. Kennedy Memorial Hosp. v. Heston*, 58 N.J. 576, 579-83, 279 A.2d 670, 671-73 (1971).

83. See, e.g., *Ramsey*, 465 So. 2d at 669 (holding the state interest in preventing suicide inapposite, since it was clear that Mr. Ramsey did not want to die, and, other than the transfusion, he willingly accepted medical treatment). But see *Heston*, 58 N.J. at 580, 279 A.2d at 672 (observing that there is no constitutional right to choose to die, that attempted suicide is a crime at common law and under New Jersey statutory law, and that the state has an interest in sustaining life).

84. *In re Conroy*, 98 N.J. 321, 350-51, 486 A.2d 1209, 1224 (1985) ("right to die" case in which court held that evidence was not sufficient to allow termination of life-sustaining treatment).



IV. THE CIRCUIT COURT AND THE COURT OF SPECIAL APPEALS IN  
THE JACKSON CASE APPARENTLY FAILED TO CONSIDER THE  
STATE'S INTEREST IN PRESERVING THE INTEGRITY  
OF MEDICAL PRACTICE

In the *Jackson* case the trial court took into account the interests of the patient and her unborn child. Judge Greenfeld found factually that Mrs. Jackson was competent and that her decision was made knowingly and voluntarily and would not endanger the delivery, survival, or support of her child. He further found that Mrs. Jackson's husband would rear and support the child if Mrs. Jackson did not survive and that Mr. Jackson was fully capable of assuming that responsibility. Thus, Judge Greenfeld apparently concluded that the state's interest in protecting minor children would be adequately served, even if Mrs. Jackson had died as a result of her refusal of a blood transfusion.<sup>85</sup> The trial court also expressly took into account Mrs. Jackson's common-law rights to informed consent and to refuse treatment.<sup>86</sup>

As to the state's interests, both the Circuit Court and the Court of Special Appeals apparently adopted the reasoning of those courts that have held that the state's interest in preserving life alone is not sufficient to override a patient's religious objections to a blood transfusion. It is undisputed that Mrs. Jackson wanted to live, and, therefore, the state's interest in preventing suicide simply did not apply.

Significantly, however, neither the trial court's decision nor that of the Court of Special Appeals addressed the state's interest in preserving the integrity of medical practice. This omission is particularly unfortunate given the dilemma that confronts hospital health care providers in Maryland.

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85. Cf. Cantor, *A Patient's Decision To Decline Life-Saving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228, 253-54 (1973) (arguing that the economic factors justifying intervention on an "avoidance of public wards" theory should be approached on a case-by-case basis and the economic circumstances sifted in each instance). In the instant case Judge Greenfeld asked Mr. Jackson whether he was in a position to care for and raise the child if Mrs. Jackson should die. Mr. Jackson stated that he would try his best. Mr. Jackson testified that he worked full time and lived with his parents. There was no testimony as to whether other members of the family would have been available to stay with the child or, if not, whether Mr. Jackson or his family could afford to hire someone to care for the child.

86. *In re Ernestine Jackson*, No. 84060043/E-17362 (Cir. Ct. for Baltimore City 1984).

V. THE COURT OF APPEALS SHOULD HAVE REACHED THE MERITS  
IN ORDER TO PROVIDE MUCH NEEDED GUIDANCE FOR  
HEALTH CARE PROVIDERS

The Jackson case represented an opportunity for the Court of Appeals to provide guidance for hospitals and physicians with regard to the recurring and difficult issues relating to the treatment of Jehovah's Witnesses. One of the foremost concerns of health care providers in such cases is the fear of civil liability. Under certain circumstances, a physician may be protected from civil liability for acts or omissions in giving assistance or medical care, pursuant to the Maryland "Good Samaritan" statute.<sup>87</sup> However, that statute provides such protection only under limited circumstances and, apparently, the statute would not protect physicians who provide emergency care in a hospital.<sup>88</sup> Additionally, as discussed above, hospital health care providers face a trend in the case law toward imposing upon them a duty to treat in an unmistakable emergency.<sup>89</sup> To complicate matters further, there is often no time in an emergency for health care providers to apply to a court for a determination of the complex legal and ethical issues.<sup>90</sup> Thus, medical personnel have legitimate concerns regarding their duty to treat patients in an emergency and the possible consequences of failing to provide such treatment. If they administer a blood transfusion over the patient's objection, they may be found civilly liable for violating the patient's common-law and constitutional rights. On the other hand, if they abide by the patient's wishes, they act contrary to the general ethical canon of the medical profession to preserve life and face an increased risk of malpractice suits.

Public policy requires that physicians be encouraged to provide prompt, medically appropriate treatment in emergencies without excessive rumination about their potential liability for providing that treatment. Regardless of whether the Court of Appeals would have found Mrs. Jackson's right to refuse a blood transfusion on religious grounds paramount to the state's interest in preserving the integrity of medical practice, in the course of balancing those interests the court could have clarified the respective rights and obligations of the parties. Moreover, the court could have offered

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87. MD. CTS. & JUD. PROC. CODE ANN. § 5-309 (Supp. 1986).

88. See *supra* note 33.

89. See *supra* note 34.

90. Mrs. Jackson was in labor on February 26, 1984. The decision of the Court of Appeals in the Jackson case was filed on June 30, 1986.

guidance as to how the state's interest in preserving the integrity of medical practice might be protected in such cases.

One possible mechanism for protecting that interest and encouraging appropriate medical treatment for Jehovah's Witnesses could be the use of a release form similar to the document held to be valid in *Shorter v. Drury*.<sup>91</sup> A substantially similar release has been recommended by Jehovah's Witness literature.<sup>92</sup> That document acknowledges the difficult position of physicians who may be subject to malpractice claims for failure to use all available procedures.<sup>93</sup> In the absence of such a mechanism, health care providers who are requested by a competent patient to withhold a medically necessary blood transfusion may be required to respect the patient's refusal of treatment contrary to their best medical judgment and yet be exposed to liability for doing so. Obviously, such a situation is both unfair and untenable. One possible result of the concern of physicians and hospitals could be an increasing unwillingness to treat Jehovah's Witnesses, a result that would be unfortunate for all concerned. Timely guidance by the Court of Appeals might have served to mitigate the risk of that possible consequence of this com-

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91. 103 Wash. 2d 645, 651-52, 695 P.2d 116, 120 (1985). The court in *Shorter* refused to construe the document as a release from liability for negligence and, therefore, reserved any comment on whether a release that purported to absolve the physician from liability for negligence would have been valid. *Id.* Generally, most courts have considered releases from liability for negligence to be void as against public policy. See Annotation, *Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient*, 6 A.L.R.3d 704 (1966 & Supp. 1986). In contrast, the document executed by Mrs. Shorter released the hospital and the physician only from responsibility for unfavorable reactions or untoward results due to her refusal to permit a blood transfusion.

92. See generally WATCH TOWER BIBLE AND TRACT SOCIETY OF PENNSYLVANIA, *JEHOVAH'S WITNESSES AND THE QUESTIONS OF BLOOD* 29 (1977). This publication provides the following suggested release language, which it attributes to a form recommended by the American Medical Association.:

I (We) request that no blood or blood derivatives be administered to [name] during this hospitalization, notwithstanding that such treatment may be deemed necessary in the opinion of the attending physician or his [or her] assistants to preserve life or promote recovery. I (We) release the attending physician, his [or her] assistants, the hospital and its personnel from any responsibility whatever for any untoward results due to my (our) refusal to permit the use of blood or its derivatives.

93. *Id.* One court has held that, even if such a release were executed, the physicians should not be held responsible for refusing to operate. *Davis v. United States*, 629 F. Supp. 1, 2-3 (E.D. Ark. 1986) ("A physician, under the law, does not have to engage in what he believes honestly to be bad medical practice simply because he is held harmless from potential legal liability."). The court in *Davis* also held that the defendant physicians in that malpractice action were under no duty to refer the Jehovah's Witness patient to other physicians who would agree to perform "bloodless" surgery. *Id.* at 5.

plex medical-legal dilemma. Regrettably, the court refused to address what it recognized as "difficult constitutional questions not capable of easy resolution."<sup>94</sup> As Judge McAuliffe critically observed in dissent, "That we cannot resolve every issue in a single case is hardly reason to refuse to begin."<sup>95</sup>

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94. 306 Md. at 565, 510 A.2d at 566.

95. *Id.* at 567, 510 A.2d at 567 (McAuliffe, J., dissenting).